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SUBJECT: UNITED NATIONS - SIXTH COMMITTEE CONTINUES
INFORMAL CONSIDERATIONS OF ADMINISTRATION OF JUSTICE

REF: A. USUN 413

[B](#). USUN/IO EMAIL (WILCOX/HACKETT)-04/18/08

[C](#). USUN 491

[D](#). STATE 37257

[E](#). STATE 51372

[1](#). (U) BEGIN SUMMARY: General Assembly Sixth (Legal) Committee experts continued to consider the draft statutes for the new UN Dispute Tribunal (UNDT) and the UN Appeals Tribunal (UNAT) at two rounds of informal consultations held on May 12-16 and June 9-11. Delegations remained divided on numerous issues and will meet on June 30-July 3 for a final round of talks aimed at concluding the Committee's considerations of the texts. If the Sixth Committee experts cannot reach consensus on the outstanding issues by July 3, the Sixth Committee will reconsider the statutes when it meets next fall. USUN has made clear the U.S. view that, whatever the outcome of the Sixth Committee's intersessional work, the General Assembly cannot adopt the statutes until the Fifth Committee (Administrative and Budgetary Questions) has reviewed them, along with any recommendations the Sixth Committee might make. Both the Fifth and the Sixth Committees are scheduled to consider the reform of the UN's system of internal justice during the General Assembly's Sixty-Third session. END SUMMARY.

[2](#). (U) BACKGROUND: The General Assembly, in resolution 62/228, decided to establish the UNDT and the UNAT as of January 1, 2009. An Ad Hoc Committee of Sixth Committee experts began its consideration of the draft statutes in April but did not reach consensus on them (ref A). The Ad Hoc Committee agreed that the Sixth Committee would hold informal consultations before its fall 2008 meeting in an effort to finalize its considerations of the draft statutes. The UN Secretariat is pressing for the General Assembly to adopt the statutes before the current session ends this summer, arguing that the statutes must be in place so the new formal system can be operational as of January 1, 2009. Among other things, the Secretariat argues that the statutes must be adopted before judges can be appointed and the Secretariat can fill other essential positions for the new justice system. The U.S. position is that the system is essentially operational once the statutes are adopted and a transitional plan is approved, both of which involved the participation of the Fifth Committee. This cannot occur until the fall. While this may entail some delays in the appointment of judges and Secretariat, with respect to action before the UNDT and UNAT, staff members will have timely and effective access for the resolution of their cases.

[3](#). (U) The German Mission's Legal Adviser coordinated the Sixth Committee's informal consultations on May 12-16 and June 9-11 and will lead the last round on June 30-July 3. He plans to seek major delegations' cooperation to ensure that the Sixth Committee experts can reach agreement on the draft UNDT and UNAT statutes by July 3. Although other delegations have moved toward the U.S. positions on expanding the new system to non-staff personnel and staff associations during the last two rounds of discussions (refs C, D), significant

differences remain. The most difficult issues appear to be the proposals to allow three-judge panels to hear certain cases before the UNDT; to permit the UNAT to consider issues of fact, including by considering new witness testimony and new documentary evidence not brought to the UNDT; and to permit the UNDT and the UNAT to grant temporary relief before the tribunals have reached a judgment on the merits. The latest results of those discussions are reflected in an annotated table he prepared, which incorporates delegations' comments and proposed amendments to the draft statutes (ref B).

14. (SBU) SUBJECT-MATTER JURISDICTION--UNDT: The EU and several other delegations generally supported USUN's proposal to replace language proposed by the Secretariat, which would give the UNDT jurisdiction to consider appeals challenging an administrative decision alleged to be in non-compliance with the "conditions of employment," with the language on jurisdiction in the statute of the current UN Administrative Tribunal. Egypt, speaking for the G-77, has continued to insist on inserting language giving the new UNDT jurisdiction to consider alleged violations of an employee's "conditions of service," arguing that such language reflects the practice of the current UNAT and is needed to prevent confusion, since the UN Staff Regulations and Rules and other UN documents refer to "conditions of service." COMMENT: The G-77 argument is specious both because the practice to which they refer does not exist apart from single decisions issued in the past and because occasional references to conditions of service in the Rules and other documents do not purport to alter the current statute of the UN Administrative Tribunal. This is an important matter of principle with far-reaching policy and financial implications. If we are unable to prevail in the Sixth Committee, there is an opportunity to reach a more favorable outcome in the Fifth. END COMMENT.

15. (SBU) SUBJECT-MATTER JURISDICTION-UNAT: USUN explained that, as a compromise, the United States could accept language in the UNAT statute that would enable the UNAT to overrule the UNDT's factual findings if they are clearly erroneous, provided they do so on the basis of the written record developed by the UNDT. If appropriate, USUN also said the UNAT could remand a case back to the UNDT so the UNDT could take further testimony or evidence or make further findings or conclusions. The UK, Switzerland, and China stressed that the U.S. proposal would not use available judicial resources efficiently, arguing that since the UNAT has more judges than the UNDT, the UNAT should be able to take additional testimony or consider additional evidence necessary to overrule the UNDT's factual findings. COMMENT: As USUN has replied, their argument not only is wrong - it relies on using three judges to do what one can and should do - but entirely misses the important underlying principle of separating the trial functions from appeals functions. END COMMENT.

16. (U) Switzerland also said its considerations of the U.S. proposal would depend on whether the U.S. would be willing to devise safeguards to ensure that the UNAT would not remand a matter to a UNDT judge whose handling of the initial matter had reflected bias or other misconduct or incompetence. COMMENT: This argument is based on the premise that a single judge has been biased and one needs three to compensate. We do not accept the premise and, if the UNAT were to determine as such, it could issue the appropriate guidance or decision, including one remanding the matter to a different UNDT judge. END COMMENT.

17. (U) SCOPE: Many delegations seemed willing to agree that the new UNDT and UNAT should not hear claims brought by non-staff personnel, including consultants and contractors, at least initially. Many delegations seemed to agree that the General Assembly should develop a new means of recourse for the UN's non-staff personnel that would replace the UN's current use of arbitration under the UNCITRAL rules. The General Assembly would then consider whether to allow non-staff personnel access to the new formal system at a later date and in light of experience gained with the new

alternative dispute resolution mechanisms for non-staff personnel. Several delegations have welcomed USUN's offer to present a proposal next fall for alternative dispute resolution based on locally and regionally based arbitration mechanisms that the UN could adopt.

¶18. (U) STAFF ASSOCIATIONS: The EU and many G-77 delegations appear prepared to agree to prevent staff associations from bringing claims in their own right or class action suits, at least initially. The UNDT and the UNAT would, however, be able to consider "friend of the court" briefs brought by staff associations.

¶19. (SBU) JUDGES: Delegations remained divided over the Secretariat's proposal to allow the UNDT judges to refer a case to a three-judge panel. Canada and Japan supported USUN's argument against allowing three-judge panels during the UNDT's initial phase. The EU and the G-77 continued to argue that they have no room to compromise their positions that, under certain circumstances, panels of judges should be able to hear cases brought before the UNDT. Australia proposed a compromise to allow the UNDT judges to submit complex questions to the UNDT in the course of the proceedings, but the EU and the G-77 opposed it. COMMENT: Once again, on the issue of principle for us, assuming that we cannot reach agreement in the Sixth Committee, there may be more flexibility on this issue in the Fifth. END COMMENT.

¶10. (U) Delegations also debated the draft statutory language on selection of judges. The EU, Australia, Canada, and New Zealand supported a process under which the GA would appoint judges on the recommendation of the Internal Justice Council (IJC) established pursuant to GA resolution 62/228, while the G-77 advocated elections. The G-77 also argued that no two judges could be of the same geographical group and stressed the need to address how the three full-time UNDT judicial posts and the two half-time posts would be rotated among the geographical regions within the UN.

¶11. (U) TRANSITIONAL MEASURES: Most delegations preferred to defer to the Fifth Committee's views on how to handle the transition between the UN's current system of justice to the new system but asked the German coordinator to prepare a list of options for the Fifth Committee to consider. Both the EU and the G77 agreed that any transitional measures would have to treat all litigants equally and said a set of objective criteria would need to be agreed upon for handling cases during the transitional period.

¶12. (U) AWARDS: Most delegations seemed inclined to defer to the Fifth Committee concerning whether the tribunals can award interest and litigation costs to successful litigants. COMMENT: While we do not think it wise or correct to describe the requirement "to treat all litigants equally," we believe that the German coordinator shares our caution in this respect, and the current language circulated to delegations does not refer to the issue of equality. END COMMENT.

¶13. (U) OTHER ISSUES: Various other issues still remain under discussion. For example, discussions on two Secretariat proposals to authorize the UNDT to grant temporary relief proved contentious. U.S. proposals to limit the circumstances under which the UNDT could grant such relief did not receive support. Instead, other delegations agreed on language to permit the UNDT to do so upon a finding that the contested administrative decision appears prime facie to be unlawful and where its implementation would cause irreparable damage. The EU, Switzerland, and G-77 also have stood by their proposal to insert statutory language requiring the Secretary-General to provide for the travel and related costs of staff and judges, which USUN alone among other delegations has opposed. Delegations also are still debating language concerning filing deadlines, standards for waiving or suspending those deadlines, and the circumstances under which an appeal can be made to the UNDT to enforce a mediation agreement. COMMENT: These are matters on which the Fifth Committee also has an interest. END COMMENT.

